UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUSTINE S. TOVAR,)
)
Petitioner-Appellant,)
)
vs.) No. 22648
)
PEOPLE OF THE STATE OF)
CALIFORNIA,)
)
Respondent-Appellee.)
)

FEB 2 - 1969

APPELLEE'S BRIEF

FILED

JAN 29 1969

WM. B. LUCK, CLERK

THOMAS C. LYNCH, Attorney
General of California

DERALD E. GRANBERG
Deputy Attorney General

HORACE WHEATLEY
Deputy Attorney General

6000 State Building
San Francisco, California
Telephone: (415) 557-2848

Attorneys for Appellee

TOPICAL INDEX

TABLE OF CASES

TABLE OF CASES (Continued)

TEXTS, STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUSTINE S. TOVAR,

Petitioner-Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent-Appellee.

No. 22648

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code sections 2241, 2242 and 2243. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

Appellant, Augustine S. Tovar, was convicted by the Superior Court of the State of California for the County of Riverside, on his plea of guilty of violating California Penal Code section 4532(b), to wit: escape, without force or violence, and sentenced to state prison for the term prescribed

by law (see Respondent's Return to Order to Show Cause, Exhibit A).

Appellant did not appeal the conviction, but did file petitions for writs of habeas corpus in the Superior Court of the State of California for the County of Marin and in the California Supreme Court (see Petition, p. 5). The petition for writ of habeas corpus filed in the Marin County Superior Court was denied on June 9, 1967, and the petition filed in the California Supreme Court was denied on July 12, 1967. Substantially the same factual and legal issues presented to the District Court were raised in those petitions (see Petition, p. 6).

B. Proceedings in the federal courts.

On November 1, 1967, appellant filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California, challenging the validity of his confinement in state prison on these grounds: (1) That his plea of guilty was induced by a promise of leniency, and (2) That his trial counsel was constitutionally incompetent because he did not know or advise appellant that the offense to which appellant pleaded guilty, i.e., escape without force or violence, had not actually been committed.

The District Court, on November 1, 1967, issued an order to show cause why the writ should not be granted, and on November 30, 1967, respondent filed a return to the order to show cause and points and authorities in opposition to the petition for writ of habeas corpus. Appellant filed a traverse to respondent's return on December 7, 1967.

On January 11, 1968, the District Court denied the etition for writ of habeas corpus, and on February 19, 1968, certificate of probable cause to appeal in forma pauperis as granted.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant is properly confined in state prison ursuant to a valid order of commitment of the Superior Court f the State of California for the County of Riverside.

II. Appellant was not denied the effective assistance f counsel.

ARGUMENT

I

APPELLANT IS PROPERLY CONFINED IN STATE PRISON PURSUANT TO A VALID ORDER OF COMMITMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE.

The District Court rejected appellant's contention hat his plea of guilty was induced by a promise of leniency nd that his trial counsel was constitutionally incompetent. he court held that the record of the proceedings at which ppellant changed his plea from not guilty to guilty convincingly stablished that appellant's plea was voluntary.

Appellant neither challenges nor controverts the istrict Court's determination that he voluntarily pleaded uilty to a charge of violating California Penal Code section 532(b); rather, appellant argues to this Honorable Court that e is improperly imprisoned in state prison because the entencing court "had no jurisdiction to try, convict, and entence appellant to the state prison . . . under California

Penal Code section 4532." (AOB 4-11).

The Superior Court's jurisdiction of the subject matter is readily determined from the language of the charged offense (see Cal.Pen.Code § 4532(b)). And, quite obviously, the Superior Court had jurisdiction of appellant's person at the time he pleaded guilty to the charged crime. See Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); People v. Garner, 57 Cal.2d 135, 141 (1961). "A court which has jurisdiction of the subject matter and of the defendant, as did the court in the instant case, has the power, upon a defendant's [voluntary] plea of guilty, to enter a judgment unassailable from collateral attack." United States v. Hoyland, 264 F.2d 346, 352-53 (7th Cir. 1959). Accordingly, the crucial determination is whether appellant's plea of guilty was a voluntary plea.

It is axiomatic that a plea of guilty, if induced by promises or threats which deprived the plea of the character of a voluntary act, is void, and a conviction based upon such a plea is open to collateral attack. Machibroda v. United States, 368 U.S. 487, 493 (1962). A voluntary plea of guilty, however, "is itself a conviction" and, like a jury's verdict, is conclusive. Kercheval v. United States, 274 U.S. 220, 223 (1927). Such a plea admits every well-pleaded allegation and constitutes a confession of guilt, leaving the trial court nothing to do except render judgment and sentence. See United States v. Hoyland, supra; Hoover v. United States, 268 F.2d 787, 790 (10th Cir. 1959).

Because his plea of guilty was freely and voluntarily

entered, as evidenced by the record before this Court (see Return to Order to Show Cause, Exhibit D), appellant cannot now assert that he was not guilty of the offense charged. See Hoover v. United States, supra.

II

APPELLANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant asserts that he was denied the effective assistance of counsel at the trial level of the proceedings which culminated in his confinement in state prison, because his counsel 1) failed to investigate the facts and circumstances surrounding the charged offense, and 2) displayed an open disinterest in appellant's case. This assertion is based upon appellant's belief that at the time he pleaded guilty to the crime of escape, he was really guilty of nothing more than resisting arrest (AOB 12-15).

"To justify a writ of habeas corpus on the ground of incompetency of an attorney an extreme case must be disclosed. [Citations omitted.] Counsel appointed by a court to represent an accused is presumed to be competent, and the burden rests upon the petitioner to prove such incompetency." Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947). Hence, even if we accept as true appellant's averment that his trial counsel advised him to plead guilty to the charge of escape, with the understanding that an agreement had been reached with the district attorney that an additional charge of burglary would be dropped, such advice and representation does not amount to incompetence, and does not vitiate appellant's

plea of guilty. See Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964).

At the time appellant entered his plea of guilty, California case law construed California Penal Code section 4532(b) to apply to an arrestee's flight, prior to booking, from the toils of the law where a warrant had issued and was outstanding for the arrestee's arrest; the arrestee was a prisoner charged with a felony and in the lawful custody of an officer at the time of his unauthorized departure. People v. Torres, 152 Cal.App.2d 636, 639 (1957). And although the California Supreme Court just recently declared that there must be a formal arrest and booking before the escape statutes come into effect (In re Culver, 69 A.C. 937, 943-44 (1968)), this change in the law does not detract from the effectiveness of appellant's trial counsel's representation. The fact that an attorney's advice to an accused, correct under state law existing at the time the accused was advised to plead guilty, thereafter is controverted by new court decisions, is not "an exceptional circumstance" justifying the conclusion that the accused did not receive the effective assistance of counsel. See Sunal v. Large, 332 U.S. 174, 182 (1947); Warring v. Colpoys, 122 F.2d 642, 645-47 (D.C. Cir. 1941), cert.denied 314 U.S. 678; compare In re Jackson, 61 Cal.2d 500, 505-08 (1964). The crucial issue is still "whether, with all the facts before [an accused], including the advice of competent counsel, the plea [of guilty] was truly voluntary." Martin v. United States, 256 F.2d 345, 349 (5th Cir. 1958), cert.denied 358 U.S. 921. As stated by this Honorable Court in Brubaker

v. Dickson, 310 F.2d 30 (9th Cir. 1962):

> "Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'" Brubaker v. Dickson, supra at 37, citing MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified in 289 F.2d 928 (5th Cir. 1961).

CONCLUSION

Appellant having failed to controvert the ruling of the District Court, it is respectfully submitted that the order of the District Court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: January 22, 1969

THOMAS C. LYNCH, Attorney
General of California

DERALD E. GRANBERG
Deputy Attorney General

HORACE WHEATLEY
Deputy Attorney General

Attorneys for Appellee

mhm
CRSF
001619